

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Jeffrey L. Butler, Jr.,	:	Case No. 1:17-cv-00604
Plaintiff,	:	Judge Michael R. Barrett
v.	:	
City of Cincinnati, Ohio, et al.,	:	
Defendants.	:	
	:	

ORDER

This matter is before the Court on Plaintiff's Motion for Leave to Amend his Second Amended Complaint and the responsive briefing thereto. (Docs. 37, 38, 39). Defendants' Motion to Strike (Doc. 30) and Motion to Dismiss (Doc. 31), along with the responsive briefing to those motions (Docs. 34, 35, 36), are also pending before the Court.

I. BACKGROUND

Plaintiff first amended his initial Complaint as a matter of course (Doc. 5) and the Court previously granted him leave to file a Second Amended Complaint (Doc. 23). Plaintiff now moves for leave to amend his Second Amended Complaint to add a claim of spoliation of evidence against Defendants City of Cincinnati and Isaac. (Doc. 37).

In his proposed Third Amended Complaint, Plaintiff alleges that those Defendants lost or destroyed key evidence in this case which relates to a February 2018 audit of the Cincinnati Police Department's overtime usage, an April 2018 Hamilton County Grand Jury Subpoena relating to that audit, and the Ohio Auditor's investigation of that audit's

findings. (Doc. 37, Attachment 1). In particular, Plaintiff alleges that at least one Bankers Box containing supporting documents related to the February 2018 audit, supportive of the April 2018 Subpoena, and related to the Auditor's investigation went missing after Plaintiff filed his Second Amended Complaint in this matter. (*Id.*). Plaintiff alleges that those documents are key evidence in this matter (Doc. 39) and Defendants' conduct was designed to and has impacted his ability to bring this case (Doc. 37, Attachment 1). He further alleges that the allegedly missing or destroyed documents were subject to a litigation hold notice. (*Id.*). Additionally, Plaintiff brings, *inter alia*, a claim under 42 U.S.C. § 1983 alleging that Defendant Issac violated Plaintiff's First Amendment right to free speech and Plaintiff's participation in the February 2018 audit, in part, forms the basis for that claim. (Doc. 23).

Defendants assert that Plaintiff's proposed amendment is futile, as he has failed to plead facts sufficient to support a spoliation claim. (Doc. 38). Defendants argue that the allegedly missing documents cannot form the basis of a spoliation claim, because those documents are not relevant to whether Plaintiff was engaged in protected conduct and Plaintiff's First Amendment claim depends on whether he was engaged in protected speech and not on whether the conclusions he reached in the February 2018 audit were correct. (*Id.*).

II. ANALYSIS

Federal Rule of Civil Procedure 15(a) governs amendments to pleadings before trial and provides that a "party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is

required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” FED. R. CIV. P. 15(a)(1). “In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” FED. R. CIV. P. 15(a)(2). However, “[t]he court should freely give leave when justice so requires.” *Id.*

Rule 15(a) contains a “liberal policy of permitting amendments to ensure the determinations of claims on their merits.” *Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987). Leave should be granted unless there is “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). “A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss.” *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000) (citing *Thiokol Corp. v. Dep’t of Treasury, Revenue Div.*, 987 F.2d 376, 382-83 (6th Cir. 1993)).

Here, Defendants do not argue that there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice and the Court does not find any of those circumstances present in this matter at this time. See *Foman*, 371 U.S. at 182.

Turning to Defendants’ argument regarding futility of the proposed amendment, Ohio recognizes an independent tort of intentional spoliation of evidence.¹ *Elliott-Thomas*

¹ The Court notes that there has been no discovery in this matter thus far, Plaintiff has moved to amend his Second Amended Complaint, and Plaintiff has not separately moved for evidentiary sanctions for spoliation of evidence. Cf. *R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F. Supp. 2d 878, 887 (N.D. Ohio 2009), *aff’d*, 606 F.3d 262 (6th Cir. 2010) (“There is no independent cause of action for spoliation under federal law, . . . but a district court’s inherent power to control litigation and protect the integrity of the judicial process allows it to impose sanctions against a party for spoliating evidence.”) (internal citations omitted); *Penix v. Avon Laundry & Dry Cleaners*, No. 91355, 2009 WL 792348, at *4 (Ohio App. Mar. 26, 2009)

v. Smith, 2018 WL 2148088, *2 (Ohio May 8, 2018) (citing *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St. 3d 28, 29, 615 N.E.2d 1037 (Ohio 1993)). In Ohio, the elements of this claim are: “(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff’s case, (4) disruption of the plaintiff’s case, and (5) damages proximately caused by the defendant’s acts.” *Id.* (quoting *Smith*, 67 Ohio St.3d at 29, 615 N.E.2d 1037). Plaintiff’s allegations, discussed above and found in his proposed Third Amended Complaint, contain the factual content that allows the Court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)); see *Bassett v. Nat’l Collegiate Athletic Ass’n*, 528 F.3d 426, 430 (6th Cir. 2008) (explaining that, in reviewing a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court must “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true and draw all reasonable inferences in favor of the plaintiff”) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). Consequently, the Court will grant Plaintiff’s Motion for Leave to Amend. See *Marks*, 830 F.2d at 69; FED. R. CIV. P. 15(a)(2).

III. CONCLUSION

Based on the foregoing, it is hereby **ORDERED** that Plaintiff’s Motion for Leave to Amend his Second Amended Complaint (Doc. 37) is **GRANTED** and that Complaint shall

(“[W]e emphasize that this assignment of error deals with a motion for sanctions for spoliation of evidence, i.e., a discovery sanction; it does not involve an independent tort action or claim for spoliation of evidence. Thus, [Defendant]’s reliance on case law dealing with the tort claim, focusing on [Plaintiff]’s failure to present evidence of [Defendant]’s ‘willful destruction’ of the personnel file, is misplaced.”).

be filed within seven (7) days of the entry of this Order. It is further **ORDERED** that Defendants' Motion to Strike (Doc. 30) and Defendants' Motion to Dismiss (Doc. 31) are **DENIED** as moot.

IT IS SO ORDERED.

/s Michael R. Barrett
Michael R. Barrett, Judge
United States District Court

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED

SEP 17 2019

STATE OF OHIO ex rel, JEFFREY L BUTLER JR,
Plaintiff,
VS.
THE CITY OF CINCINNATI et al
Defendants.

: CASE NO. A1903798
:
:
: JUDGE ROBERT P. RUEHLMAN
:
: ENTRY OVERRULING PLAINTIFF'S
: MOTION FOR TEMPORARY
: RESTRAINING ORDER AND GRANTING
: DEFENDANT'S MOTION TO DISMISS
:
:

This matter is before the Court on Plaintiff's motion for temporary restraining order and Defendant's motion to dismiss. The Court, having read the submitted briefs and in full consideration of the arguments finds Plaintiff's motion not well taken and DENIES the same, but finds Defendant's motion well taken and GRANTS the same.

Collective bargaining agreements between public employees and employers are governed under O.R.C. section 4117. Under the code, all grievances must be handled in accordance with the collective bargaining agreement itself. A collective bargaining agreement was in place between the City of Cincinnati and Jeffrey L. Butler and the grievance process outlined in said agreement must be upheld. Therefore, this Court finds that O.R.C. section 4117 governs and this Court lacks the subject matter jurisdiction over the claims. This case is hereby dismissed without prejudice and the Plaintiff's motion for a temporary restraining order is denied. Costs are to be paid by the Plaintiff.

IT IS SO ORDERED.

Date _____



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COURT OF COMMON PLEAS ENTER
HON. ROBERT P. RUEHLMAN
JUDGE ROBERT P. RUEHLMAN THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

